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Federal Communications Commission
Office of the Secretary

MOTION PICTURE ASSOCIATION
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FRITZ E. ATTAWAY
SENIOR VICE PRESIDENT
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December 19, 1991

BY HAND

Donna R. Searcy
Secretary
Office of Managing Director
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

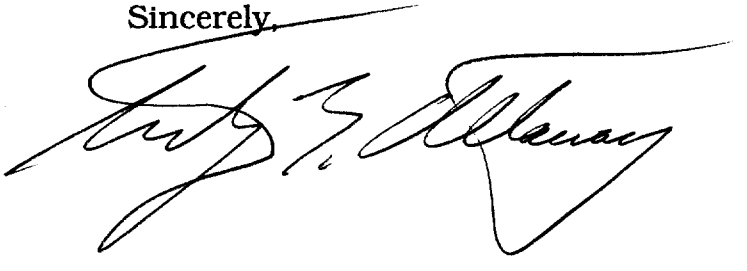
RE: FCC MM Docket No. 91-221
In The Matter Of
Review of the Policy Implications of
the Changing Video Marketplace

Dear Ms. Searcy:

Please find attached an original and five copies of "Reply Comments of the Motion Picture Association of America" filed today in the above referenced proceeding.

If you have any questions please contact the undersigned.

Sincerely,



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Attachment

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Policy Implications	)	MM Docket No. 91-221
of the Changing Video Marketplace	)	

TO: The Commission

REPLY COMMENTS OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

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DATED: December 19, 1991

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EXECUTIVE SUMMARY

MPAA reiterates its opposition to those changes in the Commission's rules applying to the structure of the broadcasting industry recommended by the Office of Plans and Policy.

MPAA does support a reexamination of the cable compulsory license, and opposes the imposition of legislated "retransmission consent" as inconsistent with copyright and contract law. The Commission's experience with syndicated exclusivity reflects the ineluctable relationships between communications, copyright and contract, and helps to make more concrete the concerns of program producers with regard to legislated retransmission consent.

A significant, incipient change in the video marketplace, overlooked in the Commission's Notice of Inquiry, may have major implications for independent program production and viewer choice. Network-affiliated stations on the West and East Coasts are agitating for permission to "shift" their prime time schedules one hour earlier. Such changes could restrict the availability of access time in high viewership periods, and could effectively foreclose the ability of independent program producers and syndicators to obtain clearances from 6 p.m. until midnight on nearly two-thirds of all U.S. television stations. The Commission's long-standing commitment to promote program diversity in prime time could be undercut by these developments. MPAA urges the Commission to commence an inquiry immediately on the public interest ramifications of prime time schedule shifting.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Policy Implications of the Changing Video Marketplace	)	MM Docket No. 91-221

TO: The Commission

REPLY COMMENTS OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

The Motion Picture Association of America, Inc. ("MPAA") hereby respectfully submits its reply to comments filed in response to the Notice of Inquiry ("NOI") issued by the Commission in the above-referenced proceeding on August 7, 1991.[1]

In its comments, MPAA advised the Commission that independent analysis of the video marketplace shows that broadcast television remains a vibrant competitor, in sharp contradiction to the findings of the Commission's Office of Plans and Policy (OPP)[2].

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[1] 56 Fed. Reg. 40847 (Aug. 16, 1991).

[2] According to David Poltrack, CBS senior vice president for planning and research: (i) the revenues of the three major broadcast networks will grow five percent in 1992, (ii) network ratings are up one percent in the current TV season, and this increase is expected to hold for the entire season, "producing [the] first increase [in network ratings] since [the] 1985-1986 season." Poltrack also believes "the fundamentals supporting network television advertising are sounder today than they have been in recent years." Moreover, Poltrack says,

MPAA urged that "convulsive regulatory change" based on the purported loss of viability of broadcasting would be unnecessary, unwarranted and contrary to the public interest. MPAA opposed the range of regulatory changes recommended by OPP, including the network-cable and broadcast-cable cross-ownership restrictions, the duopoly rule, and others. On the other hand, MPAA strongly supported OPP's call for a reexamination of the cable compulsory license because of its perverse effects on the video marketplace, but opposed the imposition of legislated "retransmission consent" as inconsistent with the current compulsory license, intrusive on current contractual relationships, and unnecessary in the event that the compulsory license is abolished.

MPAA here rebuts certain arguments introduced by proponents of legislated retransmission consent and again urges the Commission to decline to support this concept.

MPAA also highlights for the Commission a significant, incipient change in the video marketplace, overlooked in the NOI, that could have major implications for independent television production and viewer choice, to wit, the growing pressure by network affiliates on the West Coast to "shift" their prime time

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"audience growth at cable networks, Fox and in syndicated programming has slowed, meaning networks will continue to have [a] large share of any increase generated by economic recovery." See Communications Daily, Dec. 13, 1991, at 7. The Poltrack analysis is very consistent with the Veronis Suhler analysis quoted at length in MPAA's initial comments in this proceeding, and both analyses prove one fact: broadcast television, and network television in particular, is solidly competitive and will remain so for the foreseeable future.

schedules one hour earlier, and reports that similar shifts are also under consideration for the Eastern time zone. We believe that such changes could severely restrict the availability of access time in high viewership periods, with potentially serious repercussions for program diversity. We ask the Commission promptly to initiate an inquiry for the purpose of building a record on the impact of affiliate prime time schedule shifting on independent production and on the interest of viewers in diverse sources of programming.

I. THE COMMISSION SHOULD ACTIVELY ENCOURAGE CONGRESSIONAL RECONSIDERATION OF THE CABLE COMPULSORY LICENSE AND SHOULD ADOPT, OR SEEK CONGRESSIONAL ADOPTION OF, MUST-CARRY RULES TO REMAIN IN EFFECT SO LONG AS COMPULSORY LICENSING REMAINS IN EFFECT.

In its original comments, MPAA urged the Commission to endorse Congressional amendment of the Section 111 compulsory copyright license on a transitional basis to require cable TV systems to pay royalties for local broadcast signals, with such amended license to be abolished by a date certain in favor of a free market in program rights. MPAA believes this is the best way, consistent with established principles of copyright, to answer the broadcasting industry's call for a "second revenue stream" and ultimately to eliminate the "unfair subsidy" that the broadcasters believe cable enjoys from no-cost carriage of the programming contained in their

signals.

MPAA also believes that a must-carry requirement, along the lines of the "bargain" struck by the National Association of Broadcasters (NAB), the Association of Independent Television Stations (INTV), the Television Operators Caucus (TOC), the National Cable Television Association (NCTA), and the Community Antenna Television Association (CATA) in 1986, should be a part of the "transitional" compulsory licensing measure. For so long as compulsory licensing of local broadcast signals remains in place, we believe, a cable system desiring to take advantage of the license can and should be required to carry all qualified local stations.

The NAB and CBS, Inc. have advised the Commission that they believe Congress should adopt "retransmission consent" legislation to give broadcasters the right to grant or withhold their consent to a cable operator for the retransmission of their signals. These proponents claim that Congress should give them a property right in their signal vis-a-vis cable operators and certain others who make secondary transmissions that is independent of the copyrights in the programming contained therein, and that they should be permitted to exercise that right in derogation of the compulsory license and of existing contractual provisions between broadcasters and program producers that address the exercise of "retransmission consent" rights.

MPAA believes that amending the compulsory license as we have noted will permit broadcasters to recoup some portion of the value

of that component of their broadcast signal that has value -- i.e., the copyrighted programming that the broadcaster owns. When this transitional license is coupled with a must-carry requirement, all qualified broadcasters will be assured of equal protection in their relations with cable operators.

Once compulsory licensing is eliminated, then a truly free market can operate. Broadcasters, cable operators and copyright owners all can freely negotiate for transmission and retransmission rights, exclusivity, and other rights of value.[3]

The proponents of retransmission consent insist that what they seek is entirely separate and apart from copyright and has no effect on programming contracts. But the vigor of their pleas does not make their position any less wrong.

In its consideration of a related issue, syndicated exclusivity ("syndex"), this Commission insisted that a broadcaster be able to demonstrate, by the presence of explicit contract language, that it had obtained syndex rights from the copyright owner. Even though it characterized syndex as a "communications

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[3] NAB seems to fear the free market. They express concern that creating a system of full copyright liability will permit programmers to negotiate over whether a broadcaster will receive retransmission rights, or otherwise determine through bargaining how the copyrighted work may be used. See NAB at 15-16. Clearly, the NAB is advocating the creation for broadcasters of a right which would act to perpetuate the deprivation of the copyright owner's ability to control its work. The NAB is advocating that broadcasters should be able to claim a reward for that which they have not created, but merely licensed from another, with no obligation to the licensor. That would be antithetical to the constitutional principle of copyright.

policy" matter and not a copyright matter, the Commission recognized the potential conflict with copyright and contracts and therefore imposed this "magic words" condition.[4] Moreover, the interrelationship between the "communications policy" matter (syndex) and the "copyright" matter (the cable compulsory license) was explicitly recognized by the Copyright Royalty Tribunal, which took action to eliminate a "surcharge" it had placed on cable operators to account for the increased value of the copyrighted programming on distant signals to cable operators when the Commission's earlier syndex rules had been repealed.[5]

No amount of protest by the NAB and CBS can change this simple fact: legislated retransmission consent would collide with copyright law, contract law and common sense. It may serve CBS' purposes to try to give its affiliates retransmission consent rights in lieu of compensation, and it may further serve CBS' purposes to try to claim (as "reverse compensation") a piece of the consideration their affiliates receive for granting retransmission

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[4] See Section 76.153 of the Commission's rules: "Television broadcast station licensees shall be entitled to exercise exclusivity rights pursuant to Sec. 76.151 in accordance with the contractual provisions of their syndicated program license agreements, consistent with Sec. 76.159." The latter section specifies language which must appear in any agreement between a broadcaster and a program distributor in order to permit the broadcaster to invoke syndex rights.

[5] Adjustment of the Syndicated Exclusivity Surcharge, CRT Docket No. 89-5-CRA, 55 Fed. Reg. 33604 (Aug. 16, 1990).

consent. The NAB, whatever its myopic reasons, may also choose to backpedal from its historic commitment to a free market in copyrights. But retransmission consent would not serve the public interest, and it would be a major step backward from the free market that the Commission has for so many years tried to foster.

II. THE COMMISSION SHOULD EXAMINE THE EFFECT OF NETWORK PRIME TIME SCHEDULE SHIFTS ON PROGRAM SYNDICATION AND ON VIEWER CHOICE

Recently, there has been a dramatic growth in interest on the part of network-affiliated stations in West Coast markets in shifting their carriage of prime time network programming from the traditional 8-11 p.m. time period to 7-10 p.m. Late last summer, KCRA, an NBC affiliate in Sacramento, California, received a "waiver" of the prime time access rule (PTAR) pursuant to which its prime time period was redefined as 6-10 p.m. Pacific time for an 8 1/2-month "test period." CBS affiliate KPIX(TV) in San Francisco has now reportedly reached agreement with the network to undertake a similar prime time schedule shift, and KRON-TV, the NBC affiliate in San Francisco, intends to do the same.[6]

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[6] See Broadcasting, Dec. 16, 1991, at 28. KPIX will reportedly ask the Commission for a "waiver" similar to that obtained by KCRA "as part of the deal with CBS... so that the network has the opportunity in the future to negotiate starting its late-night slate of programs at 10:30 p.m." Id. Other West Coast NBC affiliates, including KSBW-TV (Salinas, California) and KING-TV (Seattle, Washington) are also considering a prime time schedule shift as early as 1992. See Electronic Media, July 29, 1991, at 3.

Meanwhile, there are widespread rumors in the television industry that at least one network is looking toward a shift in prime time on both the East and West Coasts to the 6-10 p.m. period, with the network feed running from 7-10 p.m. The level of interest on the part of affiliates on both coasts in prime time shifts is reported to be very high.[7]

MPAA is concerned that widespread shifts in network prime time, or a regulatory redefinition of the prime time period in the Eastern and Pacific time zones, could pose a threat to the viability, perhaps even the very existence, of access syndication. There can be no access syndication marketplace unless there are viable access time periods into which programs may be sold.

Currently, in every time zone, there are established, early evening, high HUT (homes-using-television) level access time periods on at least most network-affiliated stations. In the Midwest, access syndication programs typically run at 6:30 p.m. On the East and West coasts, the access syndication window is 7:30 p.m., with the majority of stations running "double access" from 7:00 - 8:00 p.m. The continued existence of an access syndication marketplace requires the continued availability of these early

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[7] "The test by KCRA could be the beginning of a trend toward an earlier network prime time across the country to coincide with the Central and Mountain time zones, where prime time runs from 7 p.m. to 10 p.m." Electronic Media, July 29, 1991, at 3. "Over 90% of the West Coast and East Coast affiliates think there should be a prime time shift...." Broadcasting, July 29, 1991, at 56.

evening access time periods.

If affiliated stations engaged in prime time schedule shifting air their early network and local news from 6:00 - 7:00 p.m. (as KCRA has done), the early evening access window will be totally eliminated. At best, syndication would be shunted off to 10:30 p.m. -- a much less desirable and viable time period.[8] If the stations elect to run a full hour of news at 10:00 p.m. (as WTHR-TV in Indianapolis did[9] and as KPIX(TV) proposes to do), or if networks succeed in getting clearances for their "late night" programming beginning at 10:30 p.m., the access syndication window will be closed entirely. In effect, syndicated programming could be foreclosed from network affiliates during the entire time period from 6 p.m. until after midnight.[10]

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[8] Indicative of the potential impact of moving access syndication to late evening is the experience of Entertainment Tonight on KCRA, Sacramento. The program earned an 11 rating on KCRA from 7:30 - 8:00 p.m. in November 1990. In November 1991, when the program had been moved to 11:30 p.m. - 12:00 a.m., its rating on KCRA plummeted to a 4.

[9] WTHR-TV reportedly ended its five-month prime time schedule shifting experiment in September 1991, restoring an hour of access syndication from 7-8 p.m. See Electronic Media, Sept. 2, 1991, at 1.

[10] At the time that it created prime time access, the Commission was certainly cognizant of the need to ensure that the access period would work to promote independent, non-network programming sources. The Commission wanted to be certain that the rule would "provide opportunity for the orderly development of additional sources of television programs," and recognized that "the particular hours of network occupancy of prime time may well have a significant effect in this regard." The Commission concluded that preserving an early access period (7-8

It is not our purpose to question the decision by network-affiliated stations to increase their local news programming efforts, which may contribute importantly to the public interest. But if, in combination with prime time schedule shifting, this change effectively eliminates the ability of independent program producers and syndicators to obtain clearances in the highest viewing level period on nearly two-thirds of all commercial broadcast TV stations, the adverse impact on the programming marketplace could be immense.

The significance of this change for independent program producers cannot be overstated, particularly when considered in the context of other changes in the programming marketplace that have hamstrung producers and threaten the continued growth of this industry, historically a global leader.

- With four network organizations now offering prime time program blocks from four to seven nights per week, the opportunities for syndicators to get prime time clearances, even on formerly "independent" stations, are diminished.
- Affiliates of the networks are under increasing pressure to clear network-originated programming, reducing potential pre-emptions to carry syndicated programming in all dayparts,

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p.m.) "would better serve the public interest as a general matter" based on "the [then-]apparent plans of independent producers and individual stations directed to the scheduling of non-network programs in prime time..." See Letter from Dean Burch (by direction of the Commission) to Mr. Richard W. Jencks, President, CBS Broadcast Group, March 11, 1971.

including prime time.

- There are also significant developments exogenous to the U.S. video marketplace that seriously affect the domestic program production industry. In particular, the imposition or threat of quotas against American-produced programs by foreign telecommunications regulators -- in particular, the European Community -- further constrain the ability of program producers (particularly those who produce at a deficit for U.S. network exhibition) to recoup their substantial investments through foreign sales.

The concerns raised by the effective preclusion of independent programming on network-affiliated stations are not unique to program producers and syndicators. The interests of the viewing public are directly affected when the diversity of programming sources available to them is diminished. As indicated above, the effect of prime time schedule shifting can be to give the three networks greater control of the prime viewing hours in every time zone. And although some local stations may increase the amount of locally produced news programming during these prime viewing hours, many others may simply cede more of their schedules to the networks, effectively undercutting the Commission's long-standing commitment to promote program diversity in prime time.[11]

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[11] The Commission should also review the potential effect of prime time schedule shifting on the viability of independent television stations. In markets where affiliates air prime time network programming from 8-11 p.m., a competing independent has a significant, higher-viewership time period (5-8 p.m.) in which to counterprogram. These hours are among the most lucrative

The Commission should not continue to deal with such a fundamental public interest issue by waiver. MPAA urges the Commission to commence an inquiry immediately into the implications of prime time schedule shifting for viewers and program producers, and to hold any further requests for waiver of the prime time access rule in abeyance pending the development of a factual record adequate to address these implications.

III. CONCLUSION

MPAA reasserts that there is no need for "convulsive" change in the regulation of television broadcasting. MPAA strongly opposes changes in the various structural rules as recommended by OPP. MPAA reaffirms its commitment to a transition from compulsory licensing of broadcast signals toward abolition of such licensing, and adamantly opposes legislated retransmission consent as a step backward from longstanding Commission goals to foster a free market in programming rights. MPAA also urges the Commission to initiate

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for most independents. In markets where prime time runs from 7-10 p.m., that competitive window is significantly reduced. It is noteworthy that in the average top-50 market in the Pacific time zone (where prime time traditionally runs 8-11 p.m.), there are 3.14 independent stations, while in the Central and Mountain time zones (where prime time traditionally runs 7-10 p.m.), there are 2.47 independents. The impact of reducing this critical counterprogramming window for independents thus warrants careful scrutiny.

an inquiry into the effects that "shifts" in the time periods in which network prime time programming is carried may have on the independent programming marketplace and on program diversity.

Respectfully submitted,

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DATED: December 19, 1991